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No. 99-1391

IN THE

Supreme Court of the United States

ROSA C. PACKARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS IN SUPPORT OF PETITIONER ROSA COVINGTON PACKARD

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BRIEF OF NEW YORK YEARLY MEETING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

New York Yearly Meeting of the Religious Society of Friends submits this brief, with the consent of the parties pursuant to Rule 37.2(a) of the Court's Rules, as a Friend of the Court in support of the petition for a writ of certiorari of Petitioner Rosa Covington Packard from the decision of the court below affirming the district court's grant of the motion to dismiss of Respondent United States of America. The letters expressing consent have been filed with the Clerk of the Court.[1]

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

New York Yearly Meeting of the Religious Society of Friends ("NYYM") is the umbrella organization for the Quaker Meetings in New York, part of Connecticut and northern New Jersey. Rosa Packard is a member of Purchase (New York) Friends Meeting, which is one of the Meetings within NYYM.

Rosa Packard's case reflects the Religious Society of Friends' long history of opposition to warfare in all forms and of advocacy of alternatives to violence for settling conflicts. Thus, on December 7, 1997, NYYM endorsed a minute supporting Rosa Packard's effort "to seek legal recognition for the reasonableness of her tax witness under the free exercise of religion clause of the First Amendment,"[2] and, on July 28, 1999, a minute was approved for NYYM to submit an *amicus* brief in support of Rosa Packard's petition for a writ of certiorari.[3]

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1. This brief is not authored in whole or in part by counsel for either party, and no monetary contribution was made in support of its preparation or submission by any person or entity other than *amicus* and its counsel.

2. NYYM, *Yearbook 1998: Proceedings and Appointments*, Minute # 27, at 7-8 (pub. Nov. 1998).

3. NYYM, *Yearbook 1999: Proceedings and Appointments*, Minute # 32, at 118 (pub. Nov. 1999).

A. Peace Testimony

We live in a culture so inured to violence that the quiet voice of peace scarcely can be discerned. From candy named "War Heads" to missiles called "Peacemakers", we are daily inundated by glorification of violence and distortion of the true nature of violence. Under these circumstances, the long history of Friends' peace testimony tends to be overlooked. The Quaker peace testimony significantly contributed to the development of the nation's self-conception and maintains an influential place in the national ethos.[4] Some of that history is described in Point I, *below*.

B. Accommodation

This Court has instructed that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990), *quoting Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality). The petition of Rosa Packard amply demonstrates that the Internal Revenue Service interprets its regulations at issue here to support a flexible system of individual exemptions. Yet, in reliance on the presumption of burden for tax matters supposedly embedded in *United States v. Lee*, 455 U.S. 252 (1982), the courts below refused to consider whether the IRS's refusal to "extend that system to cases of religious hardship" like Rosa Packard's offends the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*

The confluence of *Smith* and *Lee* appears to have created a jurisprudence in which the exercise of religious conscience will be accommodated in matters involving taxation only if

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4. *See* John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Univ. Calif. Press 1998) (hereinafter cited as "*Noonan*"), at 51-54, 72-74, 89-91, 222; *City of Boerne v. Flores*, 521 U.S. 507, 557-560 (1997) (O'Connor, J., dissenting).

convenient, even in statutes or regulations providing a system of dispensations for business and other excuses. Such a rule of law flies in the face of the First Amendment's guarantee of the free exercise of religion and may cause persons of good faith to disengage from civil society.

The long history of multifaceted governmental accommodation of Friends' practices reflects the profound respect for acts of religious conscience embodied in the First Amendment's Free Exercise of Religion Clause. Because they entail modification of rules or requirements of general application, requests for accommodation always appear burdensome or unmanageable to the magistrate or administrator saddled with responsibility for executing a law. *See, e.g., Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) (Determining that accommodating religious objection to participation in mandatory high school ROTC program would not unduly burden school board and officials). Those fears were sufficiently troubling to the district court to prompt it to declare that accommodating Rosa Packard's tax witness "would be opening Pandora's Box", would create "an impractical and unworkable system" and would be "cumbersome". *Packard v. United States*, 7 F. Supp. 2d 143, 146, 147, Pet. App. B8, B9 (D. Conn. 1998).

The history of governmental acknowledgment of Quaker testimonies and witness, however, demonstrates that requests for accommodation of religious conscience should be afforded careful consideration before being rejected on the basis of inchoate fears of pandemonium or burden, and the Religious Freedom Restoration Act's mandate to allow exceptions for religious objectors unless the government demonstrates that it has utilized "the least restrictive means"[5] would appear to compel such a detailed analysis. Some of that history of accommodation is summarized in Point II, *below*.

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5. 42 U.S.C. § 2000bb-1(b)(2).

C. Process

Quaker practice shares with the American judicial system belief in, and reliance upon, process — faith in the force of reason and reasoning together — to assure correct and legitimate outcomes on a case-by-case basis. The apparent unwillingness or failure of the courts below to provide a discerning and particularized consideration of the merits of Rosa Packard's claim, as detailed in her petition, is a matter of great concern to Quakers because it suggests a governmental bias against religious conscience. *Cf. Cassius Marsellus Clay, Jr. v. United States*, 403 U.S. 698 (1971) (Conscientious objector determinations must be made on an individualized basis and not through application of a presumption or "rule of law" as to applicant's religious sincerity). As Judge John T. Noonan explains in discussing James Madison and the intent of the Religion Clauses:

> The radicalness of JM — should we say the madness of Madison? — was to suppose that each individual has a zone in which he or she responds to the voice of God, a zone beyond political authority. . . . A's conscience might lead to refusal to cooperate in the common defense of the community (Mr. Madison was well aware of his conscientious-objector constituents). JM was willing to run these risks without discussing them, confident, I suggest, that the difficult cases would be rare and de minimis — confident, after all, that the voice of God would not often be heard in distorted or eccentric ways. . . .
>
> In the ultimate and absolute relation of each individual to God lies the limitation on civil society and civil government on which JM insists. Without that relation, why should the individual not be absorbed by the community, why should a society be constrained to respect conscience? With that

> relation to a Creator, Governor, Judge in existence for each individual, with that personal responsibility to a personal God, a government of human beings must be a government of limited powers.[6]

Modern Constitutional analysis, particularly as to the Religion Clauses, frequently employs a substantial historical review to discern the probable intent of the Founding Fathers. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). In this spirit, the discussion below highlights: (i) the history and religious character of the Society of Friends' opposition to warfare, including Friends' peace tax witness; and (ii) the long history of governmental acknowledgment of Friends' practices and beliefs in recognition of the mandate of the First Amendment's Free Exercise of Religion Clause.

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6. *Noonan* at 89. Judge Noonan goes on to identify "Ten Commandments" for the proper relationship of government to religion, the Ninth of which states:

> *Ninth.* You shall recognize that the free exercise of religion can be divisive and dangerous to established institutions and customary ways as well as beneficent for believers and empowering for the forgotten, and that the price of our constitutional liberty is acceptance of this precarious condition.

Noonan at 358.

ARGUMENT

I.

THE QUAKER PEACE TESTIMONY.

> We do utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretense whatsoever. And this is our testimony to the whole world. . . . [T]he spirit of Christ, which leads us into all Truth, will never more move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ, nor for Kingdoms of this world.[7]

Quakers are well known for their unyielding religious conviction that attention to the Inner Light, present in every person, empowers all of us to resolve disputes **without** resort to the machinery of war. This conviction results in Friends' stand against warfare in all forms.[8]

A. Origins of the Quaker Peace Testimony.

The Religious Society of Friends was born during the era of violent revolution and counter-revolution in seventeenth-century England. The times compelled the early Friends immediately to confront their faith in the Inner Light of every person in response to demands that they participate in these British wars.

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7. Declaration "Against All Plotters and Fighters in the World" addressed to Charles II by George Fox, Richard Hubberthorne and ten other Friends, January 21, 1661; *quoted* in *The Journal of George Fox*, John L. Nickalls, ed. (London: Cambridge Univ. Press 1952), at 399-400; *see also* Peter Brock, *The Quaker Peace Testimony 1660 to 1914* (Sessions Book Trust, York, England 1990) (hereinafter cited as "*Brock*"), at 25.

8. Nonetheless, the district court dismissed Rosa Packard's act of religious conscience by casting it together with acts grounded in "philosophical, moral or other reasons". *Packard v. United States*, 7 F. Supp. 2d at 145, 146-47, Pet. App. B5, B8.

With the restoration of the British monarchy in 1660, the peace testimony was first formally articulated in the official Declaration delivered to Charles II in January 1661 (quoted at the start of this section).[9] From this date on, the peace testimony has been an integral and distinctive feature of Friends' beliefs and practices, distinguishing the Society of Friends from nearly all other religious groups and calling Quakers to personal witness and testimony to support the end of warfare and the promotion of nonviolent alternatives for resolving disputes. This is reflected in Advice # 14 of NYYM's *Faith and Practice* (1998 ed.) (at 60-61) (emphasis added):

> Friends are earnestly cautioned against the taking of arms against any person, since "all outward wars and strife and fightings with outward weapons" are contrary to our Christian testimony. **Friends should beware of supporting preparations for war even indirectly, and should examine in this light such matters as** non-combatant military service, cooperation with conscription, employment or investment in war industries, and **voluntary payment of war taxes**.

B. Expressions of the Peace Testimony.

Friends seek to make real their faith and concerns through personal acts ("witness and testimony"). As a core Quaker belief, the peace testimony has been expressed in a multitude of ways including: (i) the refusal to pay taxes used to support military objectives; (ii) refusal to participate in military service; and (iii) acting to prevent warfare and providing humanitarian aid in times of war.

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9. Shortly thereafter the Quaker peace testimony and witness, together with other Friends' principles and practices, were systematically articulated by Robert Barclay in his *An Apology for the True Christian Divinity*, first published in Latin in 1676 and in English in 1678. *See Brock* at 27-29.

1. Refusal To Pay War Taxes.

One expression of the peace testimony is the refusal to pay taxes levied for military purposes. Friends have long been concerned by the inconsistency of helping to finance a war effort, while refusing to participate in warfare. For at least two hundred years, this concern has led various Friends to decline to support preparations for warfare and the machinery of war.[10]

For example, in 1755, while the Pennsylvania Assembly was debating raising funds "for the king's use" in the French and Indian War, a delegation of 20 Quakers addressed the Assembly in opposition to the raising of money for the war. They warned that "many among us will be under the necessity of suffering rather than consenting thereto by the payment of a tax for such purposes".[11]

When the bill became law, these Friends published "An Epistle of Tender Love and Caution to Friends in Pennsylvania" to explain the basis for this testimony and to encourage others to follow their faith in refusing to contribute to war taxes:

> [W]e therefore think that as we cannot be concerned in wars and fightings, so neither ought we to contribute thereto by paying the tax directed by the said Act.[12]

Quakers expressed comparable positions in opposition to taxation for military purposes during virtually every American conflict from the Revolutionary War to the present.[13]

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10. *See Brock* at 184-196.

11. *Brock* at 117.

12. *The Journal and Major Essays of John Woolman*, Phillips P. Moulton, ed. (New York 1971), at 85-86; *quoted* and discussed in *Brock* at 118.

13. *See Brock* at 190-196; *Noonan* at 222-225.

Quaker organizations also have sought to support individual refusals to pay taxes destined for military purposes. Many Friends and Quaker organizations, including New York Yearly Meeting, refused to pay the federal telephone tax imposed to help finance the Vietnam War.[14] Similarly, New York Yearly Meeting and its constituents, Purchase Quarterly Meeting and Purchase Monthly Meeting, have long actively supported the peace tax testimony in general and the leading of Rosa Packard in this case. Nearly 30 years ago, NYYM adopted Minutes supporting resistance to war taxes and creating a procedure for assisting its employees who declined voluntarily to pay taxes allocable to military purposes.[15] In February 1991, Purchase Quarterly Meeting established the Peace Tax Escrow Fund utilized by Rosa Packard and continues to administer the Fund for the tax witness of her and others. *See* Complaint at ¶¶ 14-15, 36 (JA 7a, 12a). Purchase Monthly Meeting regularly records the amount of interest and penalties seized from Rosa Packard, which is the subject of this action, as a "minute of suffering for religious conscience". And New York Yearly Meeting, in addition to authorizing and preparing this and a previous *amicus* brief, has similarly recorded its support of her witness.

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14. *Quaker Crosscurrents: 300 Years of Friends in the New York Yearly Meetings*, Hugh Barbour, ed. (Syracuse Univ. Press 1995) (hereinafter cited as "*Quaker Crosscurrents*"), at 313.

15. *Minutes and Proceedings of the 276th/277th Sessions of New York Yearly Meeting of the Religious Society of Friends*, Minute # 117, at 23, & Minute # 20, at 73 (July 25-August 1, 1971 & July 30-August 6, 1972).

Similar actions were taken by the American Friends Service Committee and Philadelphia Yearly Meeting. *See American Friends Service Committee v. United States*, 368 F. Supp. 1176 (E.D. Pa. 1973), *rev'd on procedural grounds*, 419 U.S. 7 (1974) (per curiam); *United States v. Philadelphia Yearly Meeting*, 753 F. Supp. 1300 (E.D. Pa. 1990).

2. Other Expressions of the Peace Testimony.

Friends' belief that no human being can rightly be deemed an enemy is most commonly reflected in efforts to aid those caught in the horrors of violence and to seek alternatives to violence for the resolution of disputes and differences. For example, as they have done in numerous violent conflicts over three centuries, Friends acted to provide medical supplies and other relief assistance to all sides in the Vietnam War and during the more recent struggles in Bosnia and Rwanda. The Friends Committee on National Legislation in Washington and the Quaker United Nations Offices in New York and Geneva work actively with Congress and the United Nations to develop alternatives to force and coercion in national and international affairs.[16] Other well-known Quaker organizations which seek to pursue and promote non-violent alternatives for the resolution of disputes include the American Friends Service Committee, the Alternatives to Violence Project and Friends Peace Team Project.

The peace testimony also finds expression in Friends' work to relieve or overcome poverty, injustice, and other forms of suffering, which are among the causes of war.[17] It was work of this sort that was the primary basis for the award of the Nobel Peace Prize to the Religious Society of Friends in 1947.[18]

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16. *Quaker Crosscurrents* at 253, 281, 304-307, 312.

17. *See, e.g.*, Hans A. Schmitt, *Quakers & Nazis: Inner Light in Outer Darkness* (Univ. of Missouri Press 1997).

18. D. Elton Trueblood, *The People Called Quakers* (1966), at 257. Other examples include the International Peace Research Association, which was founded by Quakers Kenneth and Elise Boulding, and VISA and VISTA, which are modeled on earlier Quaker youth work camp programs. *See Quaker Crosscurrents* at 295.

C. Conclusion.

All the expressions of the peace testimony find their inspiration in the conviction that the spirit of God dwells in each person, and that the calling of Friends is to listen and speak to that of God in others, thereby strengthening that of God within themselves. There are, of course, conflicts and disputes, and we all must struggle with evil. But in such struggles, Friends' only weapons are love, gentleness, faith, patience, purity, grace, virtue, temperance, self-denial, meekness and innocence. Petitioner Rosa Packard's peace witness profoundly reflects these core Quaker religious beliefs.

II.

HISTORY OF GOVERNMENTAL ACKNOWLEDGMENT OF QUAKER TESTIMONIES.

The lengthy history of governmental recognition of Quaker testimonies and witness, which began in the pre-Revolutionary era, includes accommodation of Friends' peace testimony and exemption from paying certain taxes, as well as respect for, and accommodation of, other Quaker beliefs and practices.

A. Accommodation of Friends' Peace Testimony.

Quaker opposition to military service was recognized and accommodated even during the American Colonial and Revolutionary War eras, and exemptions from military service on religious conscience grounds have been continued to the present.

By the middle of the eighteenth century, the absolute refusal of Quakers to fight was so familiar that at least five colonies — New York, Virginia, Massachusetts, North Carolina and Rhode Island — allowed Quakers to be exempted from the military service obligatory for other able-bodied males. (Pennsylvania, more heavily Quaker, did not even adopt a military conscription act until 1775.)[19]

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19. *Brock* at 48; *see, e.g.*, The Colonial Laws of New York, Vol. III, at 1068-70.

During the Revolutionary War, both the Continental Congress and colonial governments afforded exemption from military service for Quakers and other religious conscientious objectors.[20] These exemptions generally were continued by state governments until the demise of the state militia system in the 1850's.[21]

Conscientious objection to military service has also long received Federal governmental recognition.[22] With the Civil War came the first federal universal military service draft. In March 1863 and February 1864, Congress adopted acts exempting from service "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations. . . ."[23] Every subsequent draft law has included exemptions for persons whose religious conscience precluded their accepting military service.[24] And conscientious objection has continued to be an important expression of the peace testimony by Quakers in the United States.[25]

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20. *Brock* at 146-147; *see, e.g.*, Sessions Laws of the State of New York: 1777-1784, Vol. I, at 49.

21. *Brock* at 156-157; *see, e.g.*, Revised Statutes of the State of New York (1829), Vol. I, at 286, 317.

22. Indeed, James Madison proposed including a clause exempting conscientious objectors in the Bill of Rights. *See Brock* at 156.

23. *See Brock* at 169. These acts generally required the provision of some alternative civilian service or the payment of a commutation or substitution fee.

24. *See, e.g., United States v. Seeger*, 380 U.S. 163, 170-171 (1965); *United States v. Geary*, 368 F.2d 144, 147-148 (2d Cir. 1966); Military Selective Service Act, § 6(j), 50 U.S.C. (App.) § 456(j); *Noonan* at 222-225.

25. *See, e.g., Brock* at 142-183 & 290-298.

B. Exemptions From Paying Taxes.

While accommodation of Quaker objections to the payment of certain taxes has been complicated because most taxation programs are general revenue raising measures, rather than dedicated to particular uses, there are, nonetheless, significant examples of such governmental accommodations.

During the Civil War, Congress specifically accommodated Quaker conscientious objections to the payment of "war taxes" by providing that the commutation fee to be paid for exemption from military service was to be applied solely to humanitarian purposes.[26]

C. Accommodations of Other Quaker Practices.

Quakers believe in a single standard of truth and, therefore, decline to swear oaths.[27] During the Colonial period, governments accommodated this belief by permitting persons of "Tender Conscience" to testify without taking an oath.[28] Following the Revolutionary War, these types of statutes typically were adopted by various states[29] and have

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26. *See Brock* at 169-170. The Act provided that conscientious objectors who chose not to perform noncombatant military service "shall pay the sum of three hundred dollars . . . to be applied to the benefit of the sick and wounded soldiers." Act of Feb. 24, 1864, § 17, 38th Cong., 1st Sess., ch. XIII, 13 Stat. 6, 9.

27. New York Yearly Meeting of the Religious Society of Friends, *Discipline of the Yearly Meeting of Friends* (New York: Collins & Perkins 1810), at 47-48; New York Yearly Meeting of the Religious Society of Friends, *Faith and Practice* (1998 ed.) at 23, and Advice # 13 at 60.

28. *See, e.g.*, Colonial Laws of New York, Vol. I, at 257-58 and Vol. II, at 828-30.

29. For example, New York State in 1787 renewed the right of Quakers to affirm rather than swear. Sessions Laws of the State of New York: 1785-1788, Vol II, at 410-11. In 1798, New York extended

(Cont'd)

been continued in current federal and state laws.[30] Since oaths had been necessary for voting, these laws also had the effect of enfranchising Quakers.[31]

State laws also have long accommodated: (i) Friends' marriage practices, typically requiring only that those "marriages may respectively continue to be solemnized in the manner, and agreeably to the regulations, of their respective societies";[32] and (ii) Quaker manumissions of slaves, which frequently were not done in accordance with statutory requirements (where permitted at all).[33]

(Cont'd)
the right to affirm to "Shaking Quakers" (Shakers) and the "Universal Friends". Sessions Laws of the State of New York: 1797-1800, Vol. IV, at 214.

30. *See, e.g.*, 28 U.S.C. § 1746; Federal Rules of Evidence, Rule 603; Federal Rules of Civil Procedure, Rule 43(d); 7B McKinney's, New York Civil Practice Laws and Rules § 2309(b). *See also* United States Constitution, Art. I, § 3, cl. 6; Art. II, § 1, cl. 3; Art. VI, cl. 3.

31. Arthur J. Worrall, *Quakers in the Colonial Northeast* (Hanover, New Hampshire and London: Univ. Press of New England 1980), at 109-110.

32. The Revised Statutes of the State of New York (1829), Vol. II, at 141. Current New York law continues the exemption "among the people called friends or quakers". 14 McKinney's, New York Domestic Relations Law § 12.

33. For example, New York State Law specifically recognized Quaker manumissions of slaves, though they had not been always made "in strict conformity to the statutes". Sessions Laws of the State of New York: 1797-1800, Vol. IV, at 168.

CONCLUSION

During the Civil War, the Federal Government accommodated the Quaker peace testimony by allocating conscientious objectors' commutation fees to humanitarian purposes without suffering undue burden. Similarly, today the Internal Revenue Service is able to administer the voluntary $3.00 campaign finance check-off without disrupting our tax system. In light of these examples, surely Rosa Packard's act of religious conscience deserves a discerning consideration before determining that accommodation by providing her relief from discretionary penalties is not required by the First Amendment or the Religious Freedom Restoration Act.

For all the foregoing reasons, together with those set forth in the petition of Petitioner Rosa Covington Packard, *Amicus Curiae* New York Yearly Meeting of the Religious Society of Friends urges the Court to grant the petition for a writ of certiorari.

Dated: March 9, 2000

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